

**DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS**

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

DUKE'S SEAFOOD and
BARBARA THOMPSON
Respondents

Case Nos.: I-00-30174
I-00-70271

FINAL ORDER

I. Introduction

On November 20, 2000, the Government served a Notice of Infraction (No. 00-30174) on Respondents Duke's Seafood and Barbara Thompson, alleging that they violated 23 DCMR 3012.1, which requires persons engaged in the operation of restaurants, delicatessens or catering businesses to take all necessary precautions to keep the premises free from rats and vermin. The Notice of Infraction alleged that the violation occurred on October 31, 2000 at 847 Upshur Street, N.W., and sought a fine of \$1,000.

Respondents did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Official Code §§ 2-1802.02(e), 2-1802.05). Accordingly, on December 27, 2000, this administrative court issued an order finding Respondents in default and subject to the statutory penalty of \$1,000 required by D.C. Official Code § 2-1801.04(a)(2)(A), and requiring the Government to serve a second Notice of Infraction.

The Government served another Notice of Infraction upon Respondents on January 11, 2001. That notice (No. 00-70271) specified a different infraction date (November 20, 2000) than the date specified in the first notice (October 31, 2000). Respondents filed an untimely answer and plea of Deny to the second Notice of Infraction, and I held a hearing on April 18, 2001. Yvonne Wilkerson, the inspector who issued the Notice of Infraction, appeared on behalf of the Government. There was no appearance for Respondents. Pursuant to D.C. Official Code § 2-1802.03, the hearing proceeded in Respondents' absence.

Based upon the testimony of the Government's witness, my evaluation of her credibility, the document admitted into evidence and the entire record in this matter, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

Respondent Duke's Seafood operates as a delicatessen at 847 Upshur Street, N.E. Respondent Barbara Thompson holds the license authorizing the operation of Duke's Seafood. On October 31, 2000, Ms. Wilkerson visited Respondents' premises to conduct an inspection. She observed mouse droppings on the floor in both a storage area and a food preparation area. I find, therefore, that mice were present at the property during or immediately before Ms. Wilkerson's visit there. The floors were not clean, and there was no evidence that Respondents had arranged for an exterminator to eliminate mice from the property.

Although Ms. Wilkerson completed and signed the first Notice of Infraction, her supervisor filled out and signed the second Notice of Infraction because Ms. Wilkerson was on leave at the time. The second notice (No. 00-70271) was intended to be the second Notice of Infraction required by the December 27, 2000 Order, *i.e.*, a second notice alleging a violation of

23 DCMR 3012.1 on October 31, 2000, and not the assertion of a new violation occurring on a different day. This is evident on the face of Notice of Infraction No. 00-70271, upon which the supervisor checked the “Second NOI” box and identified Notice of Infraction No. 00-30174 as the “First NOI.” The second notice, however, contained a different alleged date of infraction (November 20, 2000) than the date of infraction alleged in the first Notice of Infraction (October 31, 2000). Because the first Notice of Infraction was served on November 20, it is likely that Ms. Wilkerson’s supervisor erroneously copied the *service date* of the first Notice of Infraction (November 20) as the *violation date* when she filled out the second Notice of Infraction. Ms. Wilkerson did not visit Respondents’ premises on November 20, and there is no evidence that Respondents violated § 3012.1 on that date.

III. Conclusions of Law

A. Disposition of Notice of Infraction 00-70271

Whenever a Respondent fails to file a timely answer to a Notice of Infraction, the Civil Infractions Act, D.C. Official Code § 2-1802.02(f), requires service of a second Notice of Infraction. The December 27, 2000 Order required the Government to comply with § 2-1802.02(f). The second notice is not the assertion of a new charge, but a second notice to the Respondents of the charges asserted in the original Notice of Infraction. Notice of Infraction No. 00-70271 was intended to be the statutorily-required second Notice of Infraction, but it failed to accomplish that goal because it did not allege the same date of violation as the first notice. Accordingly, it is not a proper second notice on its face and must be dismissed. D.C.

Official Code § 2-1802.01(c) (notice of infraction must be dismissed if facially defective).¹ I will construe Respondents' plea of Deny (submitted on the second Notice of Infraction form) as a plea to the charges asserted on both forms, *i.e.*, a plea of Deny to the charge of violating § 3012.1 on both October 31 and November 20.²

B. The Violation of § 3012.1

The rule at issue provides:

All persons engaged in the operation of any restaurant, delicatessen, or catering business shall be required to take all necessary precautions to keep the premises free from rats and vermin.

23 DCMR 3012.1.

“Vermin” is a term that includes mice. *Webster’s Revised Unabridged Dictionary* (1998), (available at www.dictionary.com) (defining “vermin” as “a noxious or mischievous animal; especially, noxious little animals or insects, collectively, as squirrels, rats, *mice*, flies, lice, bugs, etc.”) (emphasis added). Thus, the only question for decision is whether Respondents had taken “all necessary precautions” to keep their premises free from mice on October 31, 2000. I conclude that Respondents did not do so, because they did not undertake necessary precautions to eliminate the mice at their facility, including cleaning the floors and arranging for an exterminator.

¹ Arguably, Notice of Infraction No. 00-70271 could be construed as a first Notice of Infraction alleging a separate violation of § 3012.1 that occurred on November 20, 2000. The Government, however, admitted that it had no evidence that Respondents violated § 3012.1 on that date. Thus, the Notice of Infraction would be dismissed even if interpreted as asserting a violation by Respondents on November 20. D.C. Official Code § 2-1802.03(c) (Notice of Infraction must be dismissed if the Government fails to prove its case.)

² If, in the alternative, I interpreted Respondents' plea as an answer only to the charge of violating § 3012.1 on November 20, Respondents would remain in default on the charge of violating § 3012.1 on October 31. If Respondents desire that result, they may move for reconsideration of this Order.

The Rodent Control Act of 2000 classified a violation of § 3012.1 a Class 1 infraction, which is punishable by a fine of \$1,000 for a first offense.³ 16 DCMR 3201. I will impose a fine in that amount for Respondents' violation of §3012.1 on October 31, 2000.

C. The Penalty for Respondents' Untimely Answer

The Civil Infractions Act, D.C. Code Official Code §§ 2-1802.02(f) and 2-1802.05, requires the recipient of a Notice of Infraction to demonstrate "good cause" for failing to answer it within twenty days of the date of service by mail. If a party does not make such a showing, the statute requires that a penalty equal to the amount of the proposed fine must be imposed. D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f). Respondents have submitted no evidence of the reasons for their failure to answer the first Notice of Infraction. Accordingly, the statute requires that a \$1,000 penalty be imposed. Because the second Notice of Infraction will be dismissed as facially defective, no penalty will be imposed for Respondents' failure to answer it within the statutory deadline.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2002:

ORDERED, that Notice of Infraction No. 00-70271 is **DISMISSED**; and it is further

³ The Rodent Control Act of 2000 is Title IX of the Fiscal Year 2001 Budget Support Act of 2000, effective October 19, 2000, D.C. Law 13-172. See 47 D.C. Reg. 8962 (November 10, 2000); 47 D.C. Reg. 6308 (August 11, 2000). Section 910(b) of that Act established new fines for violations of various rodent control measures, including § 3012.1. 47 D.C. Reg. at 6339 (August 11, 2000).

ORDERED, that Respondents shall pay a total of **TWO THOUSAND DOLLARS (\$2,000)** in accordance with the attached instructions within twenty (20) calendar days of the mailing date of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondents fail to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting from the date of this Order, pursuant to D.C. Code Official Code § 2-1802.03 (i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondents pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondents' business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7); and it is further

ORDERED, that Respondents may file a motion for reconsideration of this Order within fifteen (15) calendar days of the mailing date of this Order.

FILED 06/10/02

John P. Dean
Administrative Judge